(4)

No. 94-1124

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

R. R. HENSLER,

Petitioner,

vs.

CITY OF GLENDALE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The doctrine of "adequate and independent state grounds" behind which respondent City of Glendale (the City) seeks to hide, has no relevance to this case. If nothing else, the court below was explicit that it meant to decide, and did decide, dispositive federal constitutional issues. See Pet. Appendix A (the Opinion).

This is a case of compelling public importance. The Opinion prescribes a regimen to which all California property owners seeking just compensation in land use regulation cases will hereafter be required to conform which, with respect, defies the law of this Court. It is an invitation to courts in other jurisdictions to similarly eviscerate this Court's constitutional law.[1]

One would be hard pressed to discern from Respondent's Brief in Opposition (Opp.) that this is an appeal from a judgment of dismissal following the sustaining of a general demurrer without leave to amend — a procedure which creates a factual record of only the complaint and matters judicially noticed *at the trial court level* (Cal. Code Civ. Proc. § 430.70).[2]

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[1] This Court need not rely on Petitioner's representation. The first published appellate decision in California explicating the Opinion — aside from a passing reference in *Cohan v. City of Thousand Oaks*, 30 Cal.App.4th 547, 554 (1994) — refused to apply it retroactively because that would undermine reasonable reliance on pre-existing law. *Del Oro Hills v. City of Oceanside*, ___ Cal.App.4th ___, 1995 Cal.App. LEXIS 50, 1995 WL 29407 (No. D017139, Jan. 23, 1995).

[2] When this case was pending below, the City attempted to thrust upon the court of appeal large chunks of improper extra-record material. The submission was ordered stricken (see Appendix F hereto). The same gambit was attempted before the Supreme Court of California, with the same result (see Appendix G hereto).

(continued)

The City's brief does not challenge these central points of Petitioner:

(1) that the City's Ordinance No. 4533 (the Ordinance) flatly prohibits any "man-made features" whatever on a 140-acre tract (see Pet. 3-4);

(2) that the Opinion presents a revisionist deconstruction of both its own and this Court's jurisprudence (see Pet. 19-22);[3]

(3) that the asserted economic condition of local governmental entities — the underlying policy justification for the procedural obstacle course constructed by the Opinion — is manifestly an improper basis for granting or withholding rights secured by the United States Constitution (see Pet. 17-18); and

(4) that the Opinion repackages the overruled *Agins I* opinion in an effort to accomplish indirectly what this

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(fn. continued)
Unchastened and apparently in the grip of some inexorable obsession, the City again offers an extended recital based on this *dehors* the record material. (Opp. 4-9) But even if this court should consider this flagrantly improper material, much of it *ipse dixit*, the City would not be aided: the bulk of it is simply irrelevant.

[3] The City notes, misleadingly, that "nothing in this Court's opinion in *Agins* [*Agins v. City of Tiburon*, 447 U.S. 255 (1980) (*Agins II*)] prevented Hensler from seeking damages in such a case pursuant to Code of Civil Procedure section 1095." (RB 23) But it is the California Supreme Court's *Agins v. City of Tiburon* opinion, 24 Cal.3d 266, 269-70 (1979) (*Agins I*), as distinguished from this Court's *Agins II* opinion, that flatly precluded damages for unconstitutional land use regulation. *Agins I* was the law in California until overruled by this Court in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). And until the California Supreme Court suggested the contrary in the Opinion, it was firmly established that such damages were *never* available in a section 1095 action (see Pet. 22 n.17) — no case in California history has ever awarded them.

Court has ruled cannot be done directly: preclude California property owners from ever securing just compensation for regulatory takings.

I

THE DOCTRINE OF ADEQUATE AND INDEPENDENT STATE GROUNDS DOES NOT INSULATE THE CALIFORNIA SUPREME COURT DECISION BELOW FROM REVIEW BY THIS COURT

As for the City's reliance on the doctrine of "adequate and independent" state grounds, "[a] state ground is 'adequate' where the judgment would have to be upheld even if the federal ground were reversed; . . . A state ground is 'independent' where its resolution is not tied to federal issues in the case," (Laurence H. Tribe, *American Constitutional Law*, § 3-24 p. 163 (Foundation Press, 2d ed. 1988)), or where resolution of the federal question "cannot affect the judgment." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). But here, resolution of the federal question will result in setting aside the judgment. If, for example, this Court finds that Petitioner may accept the validity of the regulation but seek damages because of its confiscatory impact, as did the plaintiff in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798, 824 (1992), reversal would follow[4] because then recourse to the multiple

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[4] Until the Opinion suddenly tied the Subdivision Map Act limitations period to inverse actions (a linkage never previously made in the Act's 50-year history), the controlling limitations statute was five years. Code Civ. Proc. § 319. Petitioner was entitled to rely in this law. *See Hughes v. Washington*, 389 U.S. 290, 295-98 (1967) (Stewart, J., concurring). This is the short answer to the City's

(continued)

administrative and judicial review proceedings would not be necessary. The same is true of the state court's disregard of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). (See Pet. 11-15)

Further, the California Supreme Court used the Opinion as a vehicle for a grand *pronunciamento*, delivering a holding as to how all land use cases presenting alleged violation of federal constitutional rights should be treated prospectively in California.[5]

This necessarily raises larger issues. "While it may be completely appropriate for California to condition rights which grow out of local law . . . California may not impair federally created rights or impose conditions upon them." *Willis v. Reddin*, 418 F.2d 702, 704-05 (9th Cir. 1969); see also quoted material from this Court to the same effect at Pet. 26; *Cooper v. California*, 386 U.S. 58, 62 (1976); and *People v. Brisendine*, 13 Cal.3d 528, 549 (1975). The Constitution of the United States *is* the supreme law of the land. Even in California. (Cal. Const. art. III, § 1).

(fn. continued)
rhetorical musing (Opp. 23 n.19) as to why Mr. Hensler waited until two years and three months after *First English* before filing his action.

[5] The City asserts that Petitioner failed to claim that Government Code §66499.37 effected a constitutional taking of his property, and that he "only litigated [state court issues] below and raised no federal issues." (Opp. 2, 9) This claim is false; the complaint *expressly* pleaded that the enactment of the Ordinance and subsequent actions based thereon "constituted a compensable taking by defendant City under Article 1 § 19 of the California Constitution, *and the Fifth and Fourteenth Amendments to the Constitution of the United States*." (CT 3:26-27) (emphasis added) The federal constitutional claims have been central in this case from its birth, and it is disingenuous of the City even to suggest otherwise.

II

ISSUE IS JOINED TO FORM A COMPELLING QUESTION OF IMPORTANCE: ARE THE MULTIPLE BARRIERS TO THE RIGHT OF JUST COMPENSATION CREATED IN THE OPINION BELOW PERMISSIBLE UNDER THE LAW OF THIS COURT?

The City defends the Opinion as a garden variety ripeness case (*e.g.*, Opp. 19), purporting to rely on *Williamson County*. But the Opinion defies *Williamson County* — it manufactures several procedural steps which are plainly designed as obstacles to relief. *Williamson County* held those *not* to be required. (See Pet. 14-16)

Issue is thus joined on a central question presented in the Petition: may state courts substitute their own procedural prerequisites to the availability of self-enforcing federal constitutional guarantees, so as to nullify those enumerated in *Williamson County*?

While the City is correct in noting that *Williamson County* requires ripeness in the form of an administrative "final decision" (Opp. 20), it engages in clumsy evasion of how this Court defined and circumscribed the quoted term. *Williamson County* could not be plainer in pointing out that "finality," as used in this context, requires no pursuit of either nonmonetary administrative or judicial remedies: it is the final regulatory action, not administrative or judicial reviews thereof, that mark the point at which a property owner may seek damages in state courts. 473 U.S. at 192-93.

Nor can the City sidestep *Williamson County* by asserting that pursuant to the Opinion a petition for writ of

mandate may be joined with a complaint in inverse condemnation. (See, *e.g.*, Opp. 19 n.15, 20.) One pleading may indeed be filed, but the two remedies are distinct. Each must be tried separately (*Residents of Beverly Glen, Inc. v. City of Los Angeles*, 275 Cal.App.2d 732 (1969)); adjudication of the writ petition still leaves the complaint to be adjudicated. However sliced, the procedure constructed below still adds up to at least four court proceedings and three administrative proceedings with multiple hearings in each (see Pet. 15-16) — an unconscionable and unnecessary burden[6] created by the courts of a state traditionally hostile to the payment of just compensation in land use cases (but precluded by *First English* from denying it outright).[7]

---

[6] The suggestion below that this litigational maze is required to give a regulating entity the opportunity for rescission if a regulation is found confiscatory is a pretext, because a government entity in California, as elsewhere, has always been free to amend or repeal a regulation (see Pet. 13; and see language of this Court to that effect quoted by the City at Opp. 28-29 n.24). The City speaks out of both sides of its mouth on this issue.

[7] The City attempts several gambits in an effort to evade the harshness of the regimen prescribed in the Opinion. The following are representative:

First, it attributes to Mr. Hensler a position he has never taken, claiming that he would deny a public entity the power to rescind or modify an offending regulation. (Opp. 25) But, as noted *ante*, that right is always present.

Second, the City states (Opp. 19 n.15) that should a property owner prevail in an inverse condemnation land use action, that owner could recover fees and costs. Not so. Only trial fees and costs are claimable; not reimbursable are the onerous owner expenditures (carrying costs of useless land for years, front money and other outlays) required by the administrative proceedings, nor fees and costs from the inevitable appeals, or the writ proceedings that often arise. *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 658-59 (1976).

(continued)

More importantly, the City ignores the "Catch-22" conundrum presented. Since the Opinion sanctions a harsh 90-day limitations bar on actions seeking damages as well as petitions seeking invalidation (Opinion at A29-30), California owners are told that to recover just compensation they must:

(1) file an action for damages within that 90-day period; *and also*

(2) "ripen" the case through the prescribed "exhaustion" procedures (*i.e.*, administrative appeals, variance applications, submission of multiple development plans, etc.), though obviously none of that can possibly be achieved in 90 days — nor within the one-year limitation period controlling 42 U.S.C. § 1983 actions either.

Thus, the City *de facto* argues that (1) a lawsuit complying with the 90-day limitations requirement will be unripe and therefore subject to dismissal, and (2) an appropriately ripened action will necessarily be time-barred. A property owner can thus be premature, or tardy, or simultaneously premature and tardy, *but apparently never timely*.[8] With all due respect, this is

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(fn. continued)

Third, the City attempts to negate a central pillar of *Lucas*. This Court's recognition of a citizen's right to seek damages rather than invalidation as a remedy (inconsistent with the Opinion), by attempting to transmogrify it into a matter of local (South Carolina) law. Not so. *Compare* Opp. 22-23 n.18 with *Lucas*, 120 L.Ed.2d 808-11.

[8] And a further problem exists: Californians cannot even look forward to the chance to present their claims to a federal court at the end of the state proceedings under *Williamson County*. The Ninth Circuit has interpreted *Williamson County* in juxtaposition with *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980) and other cases, so as to give *res judicata* effect to the state court proceedings (continued)

not principled jurisprudence; it is a "gotcha" game relegating the just compensation clause to "poor relation" status beyond the pale of the Bill of Rights. *Compare, Dolan v. City of Tigard*, 512 U.S. ___, 129 L.Ed.2d 304, 321 (1994).

There is no doubt that California has thus far enjoyed striking success in its efforts to frustrate application of this Court's *First English* jurisprudence. No reported appellate decision affirming or requiring just compensation for unconstitutional regulation has been issued in California, the nation's most populous, litigious and probably most highly regulated state, in at least thirty years. And commentators continue to decry California's uniquely harsh treatment of aggrieved landowners.[9]

(fn. continued)
Williamson County requires. *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 127 L.Ed.2d 373 (1994). The essence of this rule is that the very moment a federal case becomes ripe it ceases to exist. A recent district court decision held that the landowner was precluded "from ever pursuing its federal claim in federal district court. Thus, the plaintiff asserting a taking in violation of the United States Constitution will never gain redress in the federal courts, unless, of course, it successfully petitions the United States Supreme Court for a writ of certiorari." *Hayward Exchange, Inc. v. City of Oakland*, 1994 WL 46841, *4, 1994 U.S. Dist. Lexis 1421, *11 (N.D. Cal. 1994), *appeal pending*. Query: did this Court intend *Williamson County* to produce so anomalous a result?

[9] The City cannot undercut this justified criticism (which emanates not from Petitioner, as the City states at Opp. 24, but from numerous disinterested observers) by collecting the most draconian cases it can find from other jurisdictions and presenting them as a legitimate cross-section of state decisions in this area. (AOB 26) It is revealing, to say the least, that in its efforts to prove that California law is in the mainstream, *all* of the cases it selects are cases in which property owners got nothing.

(continued)

The City's response to all of this? It wants this Court to respond with "full blown applause." (RB 28)

Things do get a little surrealistic in this area of the law in California.

(fn. continued)

Nor can the City defuse this criticism by finding a couple of instances in which this Court has sustained California Court rulings. (The City's choice of *Pennell v. City of City of San Jose*, 485 U.S. 1 (1988) as an exemplar is astonishing, since *Pennell* held that a facial challenge mounted after an objectionable regulation is enacted is unripe, and the property owner must wait until an actual controversy over the regulations application is presented — *exactly the opposite of what the Opinion holds. Id.* at 11.)

Nor can it ameliorate the criticism by presenting one case, *Healing v. California Coastal Comm'n*, 22 Cal.App.4th 1158 (1994), in which a property owner prevailed. All *Healing* proves is that some cases are so outrageous that even in California some relief may be available. In *Healing*, the Coastal Commission refused for 17 years to issue a development permit because the local Environmental Review Board had not acted on the permit, even though no such board existed — in other words, where compliance was impossible. *Id.* at 1163-65, 1179.

More representative than *Healing* of California courts' attitude is the fate of *Ehrlich v. Culver City*, 15 Cal.App.4th 1737 (1993). When it decided *Dolan*, this Court vacated that opinion (129 L.Ed.2d 854 (1994)), ordering reconsideration in light of *Dolan*, with which *Ehrlich* was obviously inconsistent. On December 23, 1994, the California Court of Appeal reissued its *Ehrlich* opinion (now unpublished), virtually unchanged except for a couple of new paragraphs cavalierly brushing aside *Dolan* as essentially inapplicable, and reaching the same result.

Nor can the City negate the broad-based criticism of California's anomalous law by pointing out that not all the critical material is new (much is: one book and one article bear 1993 dates; most date from the 1980's). A new book reaching the same conclusion is William A. Fischel, *Regulatory Takings and Local Self-Governance: Economic and Political Alternatives to Constitutional Adjudication* (Harvard Univ. Press), publication expected in 1995.

Presenting a paper at an ABA seminar entitled "*Property Rights: Are There Any Left?*," Robert H. Freilich dismissed this Court's decision in *First English* as unimportant by predicting that "[s]tate and federal courts will emasculate what the Supreme Court held . . . ." Berger, *Happy Birthday, Constitution*, 20 Urban Lawyer 735, 744 n.50 (1988). These words proved prophetic in California, and now Mr. Freilich (one of the City's counsel) invites this Court to applaud the emasculation of its own law.

The Catch-22 posture of federal constitutional law, as seen through California's distorted prism, is no more and no less than this: Californians who sue promptly upon enactment of confiscatory regulations are told by this Court in *Pennell* that their suit is premature. But when they comply with *Pennell*, they are told by the Opinion that their suit is time-barred. Surely, this cannot be constitutional law.

CONCLUSION

Petitioner prays that certiorari be granted.

DATED: February 6, 1995.

Respectfully submitted,

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& MAY

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APPENDIX F

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL
- SECOND DIST.
FILED
OCT 18 1991
Robert N. Wilson Clerk
R. Taylor
Deputy Clerk

R. R. HENSLER,
Plaintiff and Appellant,
v.
CITY OF GLENDALE,
Defendant and Respondent.

No. B052246
(Super.Ct.No. NCC 41335)
(Joseph R. Kalin, Judge)

ORDER

THE COURT:*

We have read and considered appellant's motion to strike respondent's brief, filed on September 24, 1991, and respondent's opposition thereto, filed on October 11, 1991.

An appeal must be decided on the record of the proceeding which occurred in the trial court. (*People v. Wein* (1958) 50 Cal.2d 383, 411.) In this case respon-

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* WOODS (A.), P.J.

dent relies on documents which were neither before the trial court nor considered by it.

Accordingly, we grant appellant's motion. Further, we decline respondent's request that we take judicial notice of the documents. Respondent shall have 30 days from the date of this order within which to resubmit its brief, deleting any reference to the documents which were attached to its brief as Exhibits A and B, and the exhibits themselves.

Appellant's reply brief shall be due 20 days after the filing of respondent's brief.

APPENDIX G

No. S032210

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
FEB 24 1994
Robert Wandruff Clerk
/s/
Deputy

R. R. HENSLER, Appellant,
v.
CITY OF GLENDALE, Respondent.

Respondent's request that the court take judicial notice of Ordinance No. 4533 of the City of Glendale is granted. Respondent shall resubmit an authenticated copy of the ordinance. The request is denied in all other respects.

Appellant's motion to strike the exhibits to respondent's request for judicial notice is granted.

The denial in part of the request to take judicial notice is without prejudice to resubmission of the request as limited to materials shown to be proper subjects of judicial notice under Evidence Code section 459, and which are both relevant to Government Code section 66499.37 and shown to have been before the Legislature prior to the adoption of Government Code section 66499.37. (See Harris v. Capital Growth Investors XIV

(1991) 52 Cal.3d 1142, 1157, fn.6; California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 701. See also, Grupe Development Co. v. Superior Court (1993) 4 Cal.4th 911, 922; Delaney v. Superior Court (1990) 50 Cal.3d 785, 801, fn.12.)

Any further request for judicial notice shall identify and authenticate *each* item, explain the relevance of *each* item to an issue in this proceeding, and state the authority both for judicial notice of the item and for consideration of each as legislative history.

/s/ LUCAS
Chief Justice